



June 5, 2018

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Second Notice of Proposed Rulemaking Advanced Methods to Target and Eliminate
Unlawful Robocalls - CG Docket No. 17-59

Dear Ms. Dortch:

ACA International (“ACA”) respectfully submits these comments in response to the Second Further Notice of Proposed Rulemaking (Second FNPRM) released by the Federal Communications Commission (“FCC” or “Commission”) concerning a reassigned numbers database. Consumers are best protected when the credit and collection, and all other industries, have clear and workable rules for how they can communicate with consumers about information that consumers very much need. We appreciate that the Commission recognizes that the status quo is not working for both consumers and many legitimate businesses that continue to suffer because of litigation, particularly under the Telephone Consumer Protection Act (TCPA), stemming from unclear or unworkable requirements.

We remain unconvinced that a reassigned numbers database is the most pressing, or only, solution to solving the many problems associated with illegal robocallers and the lack of clarity surrounding TCPA compliance. However, we do believe there could be benefits to using one centralized database if it is developed thoughtfully. In that regard, we appreciate the opportunity to provide comments about how it might be workable. Further, we note that the FCC is seeking additional feedback on this matter as a result of ACA’s recent ruling¹ regarding the TCPA in the United States Court of Appeals for District of Columbia (D.C. Circuit Court) and is seeking feedback in response to other concerns raised in previous comments on this matter. In our comment, we outline additional feedback about important issues such as how an effective reassigned number database must be used to provide a TCPA related safe harbor, the potential challenges of costs associated with a database, and other compliance concerns.

¹ *ACA International Et. Al v. Federal Communications Commission*, No. 15-1211 (D.C. Cir. March. 16, 2018).

ACA supports the Commissions' recent increased efforts to combat illegal and fraudulent calls that are being made using automatic dialing systems, including its strong and swift enforcement actions against those harming consumers.² A laser focus on enforcing the law against individuals and "businesses" operating outside of the regulatory space is without question the best way to end abusive communications with consumers. While we applaud these efforts, we also reiterate our appeal to the FCC that any of its policymaking in this area clearly delineates between highly regulated and legitimate businesses that are communicating with consumers with informational calls, as opposed to scammers and other illegal callers. We also continue to urge it to be cognizant of any unintended consequences of these efforts, such as the blocking of calls from legitimate businesses as we outlined in a recent letter.³ It is also worth observing that the Bureau of Consumer Financial Protection has indicated in its most recent rulemaking agenda that it plans to propose new rules for the Fair Debt Collection Practices Act in March of 2019⁴, which means other agencies are also considering consumer protection measures, which allows the FCC to focus more narrowly on its statutory directive under the TCPA.⁵

Overall, ACA believes the concept of a reassigned number database that provides safe harbors to those acting responsibly could be beneficial to providing much needed relief from highly predatory and frivolous TCPA related class action litigation. However, we remain apprehensive that there are many outstanding questions about how it could be used effectively and in a cost efficient manner. The creation of a reassigned number database alone does not solve the many problems associated with onerous FCC interpretations of the TCPA, nor does it alone address the pertinent issues the D.C. Circuit Court issued a mandate of back to the FCC. ACA plans to provide additional comments in response to CG Docket No. 18-152; CG Docket No. 02-278, which addresses those issues more directly.⁶

I. BACKGROUND ON ACA INTERNATIONAL

ACA International is the leading trade association for credit and collection professionals. Founded in 1939, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 3,000 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide. Given its longstanding history and broad membership.

² FCC Fines Massive Neighbor Spoofing Robocall Operation \$120 Million (May 10, 2018), available at <https://www.fcc.gov/document/fcc-fines-massive-neighbor-spoofing-robocall-operation-120-million>.

³ See ACA International's Comments Concerning Call Blocking (January 23, 2018), available at <https://www.acainternational.org/assets/comments/aca-comments-call-blocking-mitigation-fnprm-1-23-18-final.pdf>.

⁴ Bureau of Consumer Financial Protection, *Spring 2018 rulemaking agenda* (May 10, 2018), available at <https://www.consumerfinance.gov/about-us/blog/spring-2018-rulemaking-agenda/>.

⁵ The TCPA's restriction on calls to wireless numbers and other mobile devices was not meant to apply where "the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers." H.R. REP. NO. 102-317, at 17 (1991).

⁶ *Consumer and Government Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, CG Docket No. 18-152, CG Docket No. 02-278. (May 14, 2018), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0514/DA-18-493A1.pdf ("Comment Interpretation of the TCPA").

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses. According to a recent survey, 44 percent of ACA member organizations (831 companies) have fewer than nine employees. Additionally, 85 percent of members (1,624 companies) have 49 or fewer employees and 93 percent of members (1,784) have 99 or fewer employees.⁷

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

Importantly, ACA members are committed to fair, reasonable, and respectful practices and take their obligations in collecting debt very seriously. As legitimate credit and collection professionals, ACA members play a key role in helping consumers fulfill their financial goals and responsibilities while facilitating broad access to the credit market.

II. Comments on the Second FNPRM for a Reassigned Number Database

A. The Reassigned Number Database Could be Beneficial but a Number of Unanswered Questions about it Remain

i. Information Callers Need

The FNPRM noted that the Commission would like to provide callers with the comprehensive and timely information they need to discover potential number reassignments before making a call. The Commission seeks further comment on, among other issues, the specific information that callers need from a reassigned numbers database.

ACA members have varying opinions on exactly what information is needed, however, they consistently feel that it is extremely important that information provided to callers is easily accessible, accurate, and provided for a nominal or no cost. Before moving forward with its proposed database, the Commission should ensure that the database can provide timely and accurate information about the status of disconnections and other pertinent information. While we acknowledge the burden of an accurate and complete database is substantial, if the FCC moves forward, it must be able to define clear standards for when it considers a number to be disconnected. For example, it should have a clearly identifiable standard to rely on for a disconnect date and it should define what it considers a temporarily disconnected number to be.

⁷ Josh Adams, *Small Businesses in the Collections Industry 2018*, ACA International White Paper, (May 2018), available at <https://www.acainternational.org/assets/research-statistics/aca-wp-smallbusiness-5-18.pdf>.

Callers relying on these standards should then be afforded a safe harbor against any liability if acting in accordance with the information provided by the FCC.

Some ACA members suggested the FCC database should be able to provide extensive information including: the number and whether it is a landline or cell phone number, the name of the carrier providing the data, and personal information about the consumer linked to the number. Others thought less information would be sufficient such as just whether the number has been reassigned and the date of reassignment. ACA also is aware that there are data security and privacy risks associated with the database, and urges the FCC to take appropriate steps to limit these threats for both consumers and anyone using the database.

The FCC also should clarify how it will treat numbers that belong to the same consumer but have been switched to a new carrier. An example of how this could be problematic is if a caller has a phone number from Sprint, and it is ported to AT&T changing carriers, it could appear to be reassigned, but it is still the same number and person that may need information.

It is pertinent that the FCC make this process as easy and workable as possible for callers for it to be successful, which means the major onus must be on all service providers to share information with the Commission, so numbers are not accidentally flagged as reassigned or missed.

ii. Information the Caller would Submit to the Database to Check Numbers

The Commission also seeks comment on the information a caller would need to submit to a reassigned numbers database. We think callers need several options for scrubbing numbers with the database. Using only a name or only a phone number alone may be problematic because of any manual errors for spelling or typing numbers. Callers should have a few options to check the database, while again balancing other consumer protection and privacy concerns.

In the FNRPM the FCC states that it believes that, “at a minimum, the database should be able to indicate (e.g., by providing a “yes” or “no” response) whether a number has been reassigned since a date entered by the caller.” We agree that the Commission should, at least, be able to provide an accurate yes or no when a caller checks the database. It will also be important for such information to be up to date and for the database to be able to provide callers with an understanding about how long the timeframes for how long a “yes” or “no” response should be considered accurate. We suggest that the database should be updated on a daily or at least weekly basis to make sure the information the FCC is providing to callers is accurate.

We have concerns that because of the sheer immensity of such a database there could be many problems with accuracy and timeliness when using it to scrub for reassigned numbers. If the database were to in any way impede callers from contacting consumers in a timely and efficient manner, this consumer harm of not receiving information needed that in some instances may be exigent, would outweigh any benefit of not accidentally receiving a call intended for another recipient. Additionally, if it is found that the database cannot be updated in a timely and efficient manner without passing on significant costs to callers, this again would limit consumer benefits since callers may choose not to use the database, or in some circumstances may be forced to pass on costs to consumers.

iii. Database Costs Must be Minimal or Free

It is essential that if there are significant costs and compliance burdens for callers associated with using the database, it should be clear that use of the database is voluntary so that small businesses as well as businesses making a larger volume of calls are not unfairly burdened. Even with this clarification, we are concerned that if the database is created a de facto standard for being required to check it could be created through judicial decisions, which makes it even more important that the FCC ensure it is workable and either free or affordable on the front end for businesses of all sizes.

In the FNPRM, the Commission asked the essential question about how the FCC-designated reassigned numbers database should be funded? It proposed for example whether it should establish a charge to database users to help cover the costs of establishing and maintaining the database? Further it asked, how should the charge be set (e.g., per query, a flat fee or some other basis) and how should the billing and collection process work?

Again, we would like to strongly emphasize that the cost to use the database must be free or minimal for businesses of varying size to be able to use it. As previously noted, a large percentage of collection agencies are small businesses.⁸ This is also true for many other financial institutions and other types of businesses that would need to use it.⁹ If they are faced with an excessive fee to use the database, in conjunction with the compliance and resource burden of regularly checking it, it will be impossible to regularly use. Moreover, since fraudulent and illegal callers cause the bulk of concern to consumers, saddling legitimate businesses that are already currently trying not to call reassigned numbers with high costs is clearly not the main solution to addressing abusive communications.

ACA members have no interest in calling numbers that have been reassigned and receive no benefit from reaching the wrong consumer. Accordingly, the FCC should be working in conjunction with them to make it easier to communicate with the consumers that need the information they are providing. Any excessive costs or resource burdens, on top of the draconian liability already threatening these businesses for other TCPA related litigation, would cut against enabling legitimate communications. It would also do little to target those seeking to operate outside of the regulatory environment that certainly will not be spending time and resources to check the database.

B. The Commission Must Provide a Safe Harbor from Liability under the TCPA

The success of any reassigned number database hinges on the safe harbor that the FCC associates with use of it, particularly to protect legitimate businesses from predatory TCPA litigation.

⁸ ACA International White Paper, *supra* note 4.

⁹ See, e.g., Brief Amici Curiae of the American Bankers Association, Credit Union National Association, and Independent Community Bankers of America supporting petitioners, ACA International Et. Al v. Federal Communications Commission, No. 15-1211, available at <https://epic.org/amicus/ABA%20CUNA%20ICBA%20Amicus%20Brief.pdf>. There are approximately 2,700 credit unions nationwide with five or fewer employees. Similarly, many small community banks are locally owned and operated, and operate with limited staff and resources.

Frivolous TCPA related litigation continues to plague dozens of industries throughout the country. As noted by 17 industries in a recent petition, the TCPA has turned into a breeding ground for frivolous lawsuits brought by serial plaintiffs and their lawyers who have made lucrative businesses out of targeting legitimate U.S. companies.¹⁰ Again, there is no reason the collection industry or most other businesses would want to call a reassigned number, and the collection industry and others are already actively scrubbing calling lists so that this does not happen. However, because even accidental and often harmless calls to reassigned numbers can lead to expensive and resource draining litigation, a safe harbor would provide an additional incentive to check the reassigned number database. This is win for both consumers, who may have an additional layer to shield them from accidental calls, and businesses who desperately do not want to make calls to wrong numbers and be found liable under the TCPA as a result.

As a result of the FCC's 2015 Omnibus Order¹¹, considerable liability and confusion about reassigned numbers resulted when the Commission interpreted the TCPA to conclude that a violation occurred if a reassigned number was called, other than a one-call safe harbor that did not have to be answered for the caller to be considered on notice of the reassignment. The D.C. Circuit Court recently found this one-call safe harbor to be arbitrary and capricious.¹² The court noted,

“The Commission, though, gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message. That is, why does a caller's reasonable reliance on a previous subscriber's consent necessarily cease to be reasonable once there has been a single, post-reassignment call? The first call or text message, after all, might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would often be the case with or without a reassignment).”¹³

In light of the D.C. Circuit Court's decision, the Commission asks, “whether it strengthens the need for a timely and comprehensive reassigned numbers database? Or, does it suggest that existing, commercially available databases provide callers with sufficient resources, diminishing the need for a new database or a mandatory reporting requirement?” We would argue that the D.C. Circuit Court decision rather than either of these hypotheses highlights the importance of creating clear narrowly tailored rules. In that regard, it is important that if the Commission creates a reassigned number database it must create clear and workable rules for how it can be used to ensure compliance with the TCPA that align with the reasonable reliance standard discussed in the D.C. Circuit Court decision. In accordance with this, we suggest that the FCC create an identified timeframe for a safe harbor for express prior consent that applies if a caller

¹⁰ See Letter from ACA International et al to the Members of the U.S. House of Representatives, (Mar. 8, 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Coalition_Letter_FICALA_to_House.pdf. See also Pai Dissent (“The TCPA's private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target.”).

¹¹ *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7971–78, ¶¶ 10–24 (2015) (“2015 Omnibus TCPA Order”)

¹² ACA International v. FCC, *Supra* note 1.

¹³ ACA International v. FCC, *Supra* note 1, at 36.

checks the database and the number is not found to be reassigned. We would suggest that the safe harbor last for approximately three months after the verification date.

C. The FCC Should Address the larger TCPA Concerns First

While we appreciate the FCC's attention to compliance confusion over reassigned numbers, it is important that it first address the many problems stemming from past outdated and onerous interpretations of the TCPA generally. We note that the Commission is seeking comment on many pertinent issues such as how it should define an autodialer in a separate comment.¹⁴ Since the problems with TCPA interpretations are much broader than just the issue of reassigned numbers, we would respectfully suggest that the Commission first address the issues outlined in the comments being sought concerning the larger interpretation of the TCPA, then as a next-step consider how it can best use a reassigned number database. Consumers are equally well served if the Commission provides much needed clarity on other TCPA related issues because there is significant evidence that they are not receiving important communications on their cell phones and via texts that they need because of the current confusion for how to properly comply with the TCPA.¹⁵

D. Conclusion

In conclusion, ACA International appreciates that the FCC has turned its attention to creating clear rules for how businesses can communicate with consumers through calls to cell phones and text. While the proposed reassigned database could be a helpful part of the solution, we feel that there are many outstanding issues with how the database will operate that need to be addressed before moving forward with it. Most importantly, the FCC needs to determine how using the database can provide a much needed safe harbor from excessive TCPA related litigation and how it can operate efficiently without passing on problematic costs to small businesses. Finally, we urge the FCC to first address larger issues surrounding TCPA compliance that are outlined in CG Docket No. 18-152, CG Docket No. 02-278. It makes logical sense to first address these issues as directed by the D.C. Circuit Court and then turn to how a reassigned number database might be part of the broader solution.

Respectfully submitted,

Leah Dempsey
Vice President and Senior Counsel, Federal Advocacy
ACA International
509 2nd St., NE
Washington D.C. 20002
Phone: 202-810-8901
Dempsey@acainternational.org

¹⁴ Comment Interpretation of the TCPA, *Supra* note 6.

¹⁵ See, e.g., Katie McAuliffe, *It's time for the feds to modernize telemarketing laws*, The Hill (November 2, 2017), available at <http://thehill.com/opinion/technology/358294-its-time-for-the-feds-to-modernize-telemarketing-laws>.